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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
JOHN E. LOCKWOOD,
EDGAR P. BAKER,
of Counsel.

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Statement.

The brief for the respondents concedes that there is no issue of fact (p. 1), and that the only question involved is the constitutionality of the provision for the one cent differential (p. 2). It further concedes that this provision is separable from other parts of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute (p. 2).

The sole argument advanced in support of the provision for the one cent differential is that it "is intended, not without reason, as a safeguard against monopoly".

We have already pointed out in our main brief the inherent improbability of any monopoly. But even if, for the sake of argument, it be conceived that some such apprehension may have been entertained, it does not justify the arbitrary and discriminatory method adopted by the Legislature in the provision for the one cent differential.

Argument.

I. In the first place, it is to be seriously questioned whether price discrimination based solely upon a desire to prevent possible monopoly (or "concentration of economic power") is a legitimate exercise of the police power of the State. It may be readily conceded that a Legislature may enact measures to protect the public from the evils of monopoly. Such measures are, however, directed to the preservation of a free competitive market. They do not properly extend to the forced allocation of business between competitors by the fixing of varying prices at which competitors may sell the same article. Monopoly is not a necessary attribute of size or the successful operation of a business; it exists only where obstacles have been erected in the paths of others who, but for those obstacles, might become competitors. The Legislature may remove these obstacles, when they are improper or detrimental to the public, and thus preserve equality of competition. It may not set up a system of handicaps between individuals, based on its own judgment of their respective chances of success.

The difference between assuring a fair opportunity to compete and granting to one competitor a direct price advantage over another in the sale of the same product requires no elaboration. One is a valid exercise of the police power of the State; the other is undisguised legislative preference in favor of a particular individual or group.

II. Respondents' brief devotes considerable space to a discussion of classification in support of the proposition

that the possession of a "well advertised trade name" constitutes a reasonable basis for classification in fixing a discriminatory price differential. The brief ignores the distinction between classification for the purpose of taxing or regulatory statutes, on the one hand, and for the purpose of price fixing on the other.

Classification for the purpose of price fixing presents a problem distinct from that raised in the cases cited by respondents relating to classification for purposes of taxation or regulation. The effect of classifications established in taxing and regulatory statutes is essentially different from that in price fixing measures.

The extent of the power of classification for purposes of taxation has frequently been considered by this Court and is discussed in our main brief at pages 24 to 26. The States have also been granted considerable latitude, although perhaps in lesser degree, in making classifications in the exercise of their ordinary regulatory powers. The necessities of the State and the complexity of the problems which the Legislature must meet, as well as the difficulty of drawing dividing lines with absolute precision, have afforded justification for the latitude permitted in the making of such classifications. Practical considerations have been difficult to evaluate and the unequal burdens complained of have been for the most part incidental and frequently what the Court has described as "mere hypothetical and fanciful illustrations of possible discriminations which had had no basis in the actual experience to which the Statute was addressed" (*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 372).

It is submitted that legislation for price fixing presents a different situation. Price regulation by Government imposes on the individual a direct and continuing burden which cannot be compensated. As this Court pointed out in *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 430, the power to fix prices "is not only a more definite and serious invasion of

the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on".

Price is the determining factor in the sale of any product. To speak conservatively, it is a delicate, not to say dangerous subject for governmental intervention. But if the Government is bound to intervene, it should be for compelling reasons and the measures adopted should be based on sound and not fanciful grounds. Classifications for purposes of price fixing should be founded on cost or quality of the product sold or the character of the services rendered; otherwise they have no adequate relation to the limited purpose by which legislative price-fixing is justified. A classification based upon the possession of a "well advertised trade name" is too slender to support the drastic and discriminatory price distinction embodied in the one cent differential.

It is noteworthy that respondents have little to say in favor of the device represented by the one cent differential. This is not surprising, in view of the fact that it threatens the demoralization of the proper administration of the entire statute. In effect it perpetuates many of the evils of destructive price cutting, which the Law was specifically intended to correct. Respondents' brief comments upon the difficulties encountered by the Government in its experiments with price fixing and concludes, "Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box". The fact that these troubles are inevitably encountered does not justify so arbitrary and discriminatory a solution as the one cent differential. If, upon the demand of self-interested groups, State Legislatures are to be free, under the guise of an alleged "classification", to fix varying and discriminatory prices for competitors selling the same article under similar conditions in the same field, we fear that Pandora's box may prove quite inadequate.

III. In the concluding paragraph of *Nebbia* v. *New York*, 291 U. S. 502, 539, this Court stated:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with personal liberty."

The provision for the one cent differential meets none of these tests. We have pointed out that it is arbitrary and discriminatory, in that it has no relation to cost, either the general cost of the business or the cost of appellant's advertising; it has no relation to quality; it has no relation to service; it forms no part of the carefully considered plan presented by the investigating bodies formed for that purpose; and it is economically indefensible.

Furthermore, it is irrelevant to the policy and avowed purpose of the Legislature in enacting the legislation. It bears no relation to the emergency which gave rise to the legislation. The one cent differential results in no benefit to the farmer, for whose relief the bill was specifically intended. In fact, it is becoming increasingly evident that, by perpetuating the destructive practice of price cutting, it is demoralizing the effort to administer the law and may well bring about the defeat of its well-intended provisions.

The principle involved is important and far reaching in its consequences and implications. We submit that there is nothing in this case which should lead this Court to place upon it the stamp of its approval.

Respectfully submitted,

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